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No. 03-247

IN THE

Supreme Court of the United States

PETER A. SARDAGNA; LAMM EMPLOYEES LP; LAMME, INC.,

Petitioners,

v.

CB RICHARD ELLIS INVESTORS, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The sole issue presented by the petition for certiorari in this matter is whether the Ninth Circuit erred in finding that the ERISA claims brought against Petitioners by Respondent CB Richard Ellis Investors, LLC ("CBRE") on behalf of the Southern California, Arizona, Colorado, and Southern Nevada Glaziers Architectural Metal and Glass Workers Pension Trust ("Plan") were not barred by the ERISA statute of limitations, 29 U.S.C. § 1113, where the only representatives of the Plan who had knowledge of the unlawful transaction within the three-year limitation period were fiduciaries of the Plan who participated in the unlawful transaction and were never plaintiffs in this action.

STATEMENT PURSUANT TO RULE 29.6

Respondent, CB Richard Ellis Investors, LLC, is wholly owned by CB Richard Ellis, Inc.

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OPINIONS BELOW

Petitioners correctly identify and attach copies of the relevant opinions below. However, Petitioners repeatedly mischaracterize these opinions and the evidence upon which they were based, as discussed more specifically below.

STATUTES AND OTHER PROVISIONS INVOLVED

Petitioners correctly quote the applicable ERISA statute of limitations provision. Following are additional relevant ERISA provisions:

29 U.S.C.S. § 1106: Prohibited transactions

> (a) Transactions between plan and party in interest. Except as provided in section 408 [29 U.S.C.S. § 1108]:
>
> > (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
> >
> > > (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
> >
> > > (B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [29 U.S.C.S. § 1107(a)].

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a) [29 U.S.C.S. § 1107(a)].

(b) Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest. A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

29 U.S.C.S. § 1132(a): Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C.S. § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 U.S.C.S. § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) or under subsection (i) or (l);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 609(a)(2)(A) [29 U.S.C.S. § 1169(a)(2)(A)]);

(8) by the Secretary, or by an employer or other person referred to in section

101(f)(1) [29 U.S.C.S. § 1021(f)(1)], (A) to enjoin any act or practice which violates subsection (f) of section 101 [29 U.S.C.S. § 1021(f)], or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [subtitle] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

STATEMENT OF FACTS

Respondent CBRE is the investment manager for the Plan, an employee pension benefit plan as defined in ERISA.[1] The participants and beneficiaries of the Plan are current and retired union workers in the glassworking and related construction trades in various western states. At the time of the events giving rise to this action, the Plan was managed by a Board of Trustees, consisting of both management and union representatives, and by William Seay, its administrator and investment adviser. Seay resigned in 1998, and CBRE was hired in September 21, 1998.

In 1989, the Plan began investing in a 157 acre parcel of real property located in Carson, California (the "Carson Property"). Petitioner Peter Sardagna, a real estate consultant, acted as project manager respecting the Plan's investment in the Carson Property from 1989 through 1997, supervising efforts to obtain entitlements and financing for the property.

In September 1989, the Plan's trustees voted to invest $6 million toward a possible purchase of the Carson property. The Plan, through a Plan-controlled entity, Carson Realty Project, Inc. ("CRP, Inc."), paid $3,150,000 to the bankruptcy estate of World Industrial Centers, Ltd. ("WIC") as a down payment on an option to purchase the Carson property for $47 million. Concurrently, CRP, Inc., assigned its interest in the purchase option to a newly-formed partnership, Carson Realty Partners, 1989, L.P. (the "Partnership"), owned 75% by Robert Ferrante and 25% by Sardagna. The Plan also agreed to loan $2.85 million to the Partnership.

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1. 29 U.S.C. § 1002(2)(A).

In 1989, the Carson property was environmentally contaminated and could not be developed. The $2.85 million loaned by the Plan to the Partnership was to be spent on "site characterization" in order to obtain entitlements for the property — including a State-approved remedial action plan and other permits necessary for development. The hope was that with entitlements the Partnership and the Plan could obtain financing to buy the property for $47 million and resell it at a profit. If this occurred, the Plan was to receive a 15% return on its investment and a 15% interest in the profits of the Partnership. The transaction gave Sardagna and Ferrante a chance to purchase the Carson property at no cost to them and with all financial risk on the Plan. While the site characterization and entitlement process proceeded, Sardagna and Ferrante received monthly compensation paid by the Plan.

By 1991, the Plan's $6 million in Carson advances had been exhausted, and none of the entitlements had been obtained. In September 1991, the Trustees approved a "loan" to the Partnership of an additional $3 million. The Plan did not obtain any security for the "loan" or any credit-worthy borrower. In agreeing to this loan, the Plan Trustees relied solely on presentations by Sardagna, Seay and Ferrante.

In 1993, CRP, Inc.'s right to purchase the Carson property from WIC expired. CRP had no money to proceed with the purchase, and the environmental conditions to the purchase had not been satisfied. By 1993, however, Sardagna and Ferrante had come up with a grandiose plan for development of the Carson property as a factory outlet shopping mall, called "LA MetroMall." This concept involved increased risk and expense to the Plan, requiring recruitment of a credible shopping center developer, public and private financing in

the hundreds of millions, and financable leases to tenants of the mall. The Plan kept funding the project without a written agreement concerning the repayment of the advances or the Plan's participation in any ultimate profits. Additional millions were advanced for architects, environmental consultants, engineers, and leasing agents for the potential mall. The Plan's sole "advisers" on the mall concept were financially interested parties — Sardagna, Ferrante and Seay — who had no experience in a development of this kind.

In 1994 the FDIC, which held first trust deeds on the Carson property, decided to hold an auction sale of its notes and trust deeds at the urging of Sardagna, Ferrante and Seay. CRP, Inc. submitted a $5 million bid which was accepted, and the Plan funded $5 million to purchase the notes and trust deeds in October 1994. By this time, the Plan had advanced nearly $18 million on the Carson property.

The Plan's acquisition, through CRP, Inc., of the FDIC notes and trust deeds gave the Plan the ability to acquire the Carson property through foreclosure and deal with it free of Sardagna and Ferrante, who had no interest in the property. Under the influence of Seay, Sardagna and Ferrante, the Trustees continued with the MetroMall project and made a new economic deal with Sardagna.

The Plan entered into the LA MetroMall LLC Operating Agreement on August 16, 1995, with Petitioners LAMM Employees, L.P., and LAMME, Inc., entities controlled by Sardagna. The essential deal was that the Plan would contribute 144 acres of the Carson property and all of its contractual rights in the Carson property to the LLC. The Plan would become managing member of the LLC.

Petitioners would make a $50,000 capital contribution[2] and would be the non-managing member. Initially, the Plan would have a 99% interest and Petitioners 1%. The Plan would continue funding 100% of all cash contributions to the LLC, in anticipation of the outlet mall development. The hope was that construction financing would be obtained to repay the Plan its advances plus a 15% return, as well as a $6 million amount attributable to "PRP" liability. After the Plan recovered these amounts, the interest would "flip," so that Petitioners would thereafter receive *99%* of any distributions and the Plan 1%. While this process went forward, the Plan would continue to fund monthly compensation for Sardagna. Sardagna was then being paid $20,000 per month by the Plan. Most importantly, the Operating Agreement also gave Sardagna the right to consent to any sale of the Carson property, not to be unreasonably withheld.

Prior to the execution of the LA MetroMall LLC Operating Agreement, Petitioners had no interest in the Carson property or any proceeds from the sale of the property. Under the LA MetroMall LLC Operating Agreement, the Plan took all of the economic risk of failure of the Carson project, but received only a fixed fifteen percent (15%) return if the investment in the property proved to be successful, while Petitioners, who had no money invested, were entitled to substantially all of the "upside," potentially millions of dollars, while continuing to receive substantial compensation for Sardagna's services on the project.

By early 1997, the entitlements for the Carson property were incomplete, the "MetroMall" project had never gotten

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2. Sardagna claimed to have made this contribution with funds borrowed from the Plan and never repaid.

off the ground, and the Plan had invested still more millions in the project. By 1997 the Plan was in dire financial straits as a result of the Carson transaction and other speculative real estate investments. The Carson property was the Plan's largest and most disastrous investment.

The Plan finally sought independent professional advice and in December 1997 American Realty Advisers ("ARA"), a real estate consulting firm, became investment manager for the Plan. Seay thereafter resigned and the Plan severed its relationship with Sardagna and Ferrante.

CBRE succeeded ARA as the Plan's investment manager in September 1998. CBRE initiated an investigation of the Plan's Carson investment. Based on that investigation, CBRE brought this ERISA action against Sardagna, Ferrante, Seay and their entities, alleging that the LA MetroMall transaction was (i) a "prohibited transaction" with a "party in interest" in violation of Section 406(a) of ERISA, and (ii) an imprudent transaction that violated Section 404(a) of ERISA. 29 U.S.C. §§ 1106(a) and 1104(a). CBRE sought equitable relief under Section 502 of ERISA, 29 U.S.C. § 1132(a)(3), to rescind and cancel Petitioners' interest in LA MetroMall, LLC, and any of their rights under the Agreement. A major goal of the litigation was to obtain clear title to the Carson property, enabling the Plan to sell the property free of any "consent right" of Sardagna.[3]

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3. At trial Sardagna's counsel told the jury that Sardagna would not consent to any sale of the Carson property unless he were paid substantial money by the Plan. Consistent with this position, Sardagna refused to consent to several potential sales of the property, impeding the Plan's efforts to get some return on its multi-million dollar investment.

This ERISA action was brought for the benefit of the Plan and, ultimately, its participants and beneficiaries. However, under ERISA the Plan itself lacked standing to bring the action and CBRE, as a fiduciary to the Plan, was the *only* plaintiff on these claims. *See* 29 U.S.C. § 1132(a). The Plan's trustees, in particularly, were never plaintiffs or otherwise parties to the action. Thus, it is misleading for Petitioners to refer to CBRE as a "nominal co-plaintiff" on the ERISA claims.[4]

CBRE's ERISA claims against Sardagna were tried to the District Court in May 2001. On September 17, 2001, the District Court ruled that the ERISA claims were barred by the statute of limitations. CBRE moved to alter or amend the judgment, contending that under the Ninth Circuit's decision in *Landwehr v. DuPree*, 72 F.3d 726 (9th Cir. 1995), the three-year statute had not run because CBRE, the plaintiff, had no knowledge of the unlawful LA MetroMall transaction more than three years before filing the action. On December 4, 2001, the District Court agreed, and ruled that CBRE's ERISA claims were not barred by ERISA's statute of limitations.

The District Court's December 4, 2001 order also ruled against CBRE on two of its ERISA claims against Petitioners for violations of Section 404(a) of ERISA, finding that Sardagna was not a fiduciary to the plan and was not liable for knowing participation in imprudence by the plan's fiduciaries in connection with the LA MetroMall transaction.

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4. The complaint also alleged common law and RICO claims, under which the Plan as an entity had standing to sue and was the plaintiff. These claims were bifurcated from the ERISA claims and tried to a jury first, resulting in a verdict for Petitioners. Judgment was entered on the jury verdict on October 16, 2001.

The District Court also ruled, however, that the LA MetroMall transaction transferred Plan assets to and for the benefit of Petitioners and, if Sardagna was deemed a service provider to the Plan, the transaction would constitute a prohibited transaction in violation of Section 406 of ERISA. 29 U.S.C. § 1106(a). After further briefing, including an *amicus curiae* brief filed by the United States Secretary of Labor in support of the Plan's position, the District Court ruled on April 30, 2002, that Sardagna was a service provider to the Plan and that the LA MetroMall transaction was a prohibited transaction in violation of Section 406. The Court granted the equitable relief sought by CBRE: rescission and cancellation of Petitioners' interest in the LA MetroMall Operating Agreement.

Petitioners appealed from the April 30, 2002 order, and also appealed from the December 4, 2001 ruling to the extent that it rejected Petitioners' statute of limitations defense and other equitable defenses. In a memorandum opinion, the Ninth Circuit affirmed the District Court's rulings on both the statute of limitations defense and the prohibited transaction ruling. Petitioners have sought this Court's review only of the Ninth Circuit's statute of limitations ruling.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 provides the proper standard by which a petition for certiorari is evaluated: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons."[5]

5. **Rule 10. Considerations Governing Review on Certiorari**

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

No such "compelling reason" exists in this case. Rather, this case represents a routine application of settled case law in which the Ninth Circuit properly applied *Landwehr v. DuPree*, *supra*, to the facts. Moreover, even if the Ninth Circuit had misapplied ERISA's statute of limitations and *Landwehr* to the facts of this case, that would not be a sufficient ground to grant review under Rule 10. The unpublished memorandum decision in this case is unremarkable and does not present an important legal or factual question to be reviewed by the Court. Rather, it turns on its own facts and does not extend settled law. It does not conflict with any decision of this Court, the Courts of Appeals in other circuits or any other court. Indeed, the decision is *consistent* with all other decisions on the issue. There is simply no basis for this Court to grant the petition for certiorari.

I. The Ninth Circuit Properly Concluded That CBRE's ERISA Claim Was Not Time Barred

ERISA contains an absolute six-year limitations period, and a three-year period running from the date "on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113. Only a "participant, beneficiary or fiduciary" may bring actions for equitable relief to remedy violations of ERISA. 29 U.S.C. § 1132(a). Here, the ERISA plaintiff is CBRE, an investment manager appointed by the Plan in 1998, which obtained knowledge of the "breach or violation" within three years before the action was filed on August 6, 1999.[6]

6. Petitioners state throughout their petition that the action was brought by the "Plan." As stated above, under ERISA, the Plan did not have standing to bring an ERISA claim against Petitioners, (Cont'd)

Petitioners' argument that the Trustees' knowledge of the LA MetroMall transaction should be imputed to CBRE for statute of limitations purposes, thereby triggering the running of the three-year statute of limitation as of August 16, 1995, was rejected by the Ninth Circuit in *Landwehr v. DuPree*, *supra*, 72 F.3d 726. In *Landwehr*, the plaintiffs were beneficiaries of a profit sharing plan for a closely-held corporation. *Id.* at 730. Kindred, the corporation's owner and a fiduciary of the plan, had improperly transferred $89,000 from the plan to his chauffeur, DuPree. *Id.* The plaintiffs sought equitable relief against DuPree on behalf of the plan under ERISA, just as CBRE did here against Sardagna. The District Court ordered DuPree to make restitution of some $54,000 of plan assets he had received in violation of ERISA and the Ninth Circuit affirmed. *Id.*

DuPree raised a statute of limitations defense. He conceded, as do Petitioners in the present case, that the named plaintiffs did not acquire actual knowledge of the breach so as to trigger the running of the statute of limitations. Instead, DuPree argued, as Petitioners do, that the plan was the "real" plaintiff and that the statute of limitations should start to run whenever any agent of the plan acquired knowledge of the breach. *Id.* at 732. According to DuPree, the statute of limitations began to run when Kindred, a plan fiduciary, transferred the money to DuPree. Thus, Kindred's knowledge of his own breach should be attributed to the plan, triggering the statute of limitations.

(Cont'd)

29 U.S.C. § 1132(a), but CBRE, as a fiduciary to the Plan, did have standing. Therefore, Petitioners' mischaracterization of CBRE as a "nominal co-plaintiff" throughout the petition is misleading. CBRE is the *only* plaintiff that had standing to bring an ERISA action and is the sole respondent to this petition.

The Ninth Circuit rejected this argument. It expressly held that the running of the statute is not triggered by the knowledge of plan fiduciaries who participated in the transaction that violated ERISA, but instead begins to run when the person bringing the suit learns of the breach or violation. *Id.*

> If the statute of limitations started to run on the first day that a fiduciary knew of the violation, then the statute of limitations would begin to run on the date that [the fiduciary] breached his duties. . . . That would obviously defeat the purpose of section 1113's requirement that the limitations period run from the date when the plaintiff acquired actual knowledge of the breach, rather than on the date of the breach.

Id. at 732-33. Otherwise, a fiduciary and his co-participants could escape liability simply by retaining control over the plan and avoiding publicity of their misconduct for three years.

The knowledge of the Plan's trustees, like the knowledge of the breaching fiduciary Kindred, cannot be imputed to CBRE for statute of limitations purposes in this ERISA action against Petitioners, who stand in the same position as DuPree in *Landwehr*. CBRE's claims in the present case, although asserted only against Petitioners, of necessity involved proof of fiduciary breaches by the Plan's trustees. At trial, CBRE proved that the LA MetroMall LLC transaction was a prohibited transaction under ERISA. Petitioners could have no liability to the Plan unless the trustees and/or Seay had breached their fiduciary duties by entering into the LA MetroMall LLC Operating Agreement. 29 U.S.C. § 1106(a).

Petitioners noted as much in their Post-Trial Brief, where they stated that the breach or violation on which CBRE's ERISA claim is predicated "is the alleged failure on the part of the trustees themselves . . . to comply with the duties imposed on them . . . to refrain from prohibited transactions under ERISA § 406." Thus, the knowledge of the trustees at the time they transferred valuable rights to Sardagna under the LA MetroMall Operating Agreement is precisely the same as the knowledge of Kindred when he transferred plan money to DuPree. The fact that CBRE sought equitable relief only against Petitioners who, unlike the Trustees, claimed interests in the Carson property, is immaterial for statute of limitations purposes.

Petitioners also mischaracterize the facts by asserting that CBRE argued for the first time on its motion to alter or amend that the Trustees of the Plan were wrongdoing fiduciaries. As shown above, CBRE's claims in the present case, although asserted only against Petitioners, necessarily involved proof of fiduciary breaches by the Plan's trustees. CBRE proved that the LA MetroMall LLC transaction was a prohibited transaction under ERISA. A prohibited transaction, by definition, requires breaches of duty by plan fiduciaries, in this case, the trustees and Seay. 29 U.S.C. § 1106(a). This was apparent from the original complaint and was not raised as a tactical device after trial.

Petitioners further mischaracterize the facts by asserting that the Trustees are using *Landwehr* to indefinitely "extend" the limitations period. This theory supposes that the Trustees realized they had engaged in a prohibited transaction, realized the limitations period had run, and concocted a plan to hire CBRE to avoid the statute of limitations through *Landwehr.* In fact, as the District Court recognized, there was no

evidence of any such purpose. Rather, CBRE was engaged to provide professional real estate management and protect the Plan from further disastrous real estate investments. Moreover, a Plan has no ability to "indefinetely extend" the ERISA statute of limitations, which contains an absolute bar of actions brought more than six years after the violation. 29 U.S.C. § 1113.

Petitioners have had the benefit of a court's reasoned analysis of the statute of limitations issue on three separate occasions, twice by the district court and once by the Ninth Circuit. *Landwehr* has been correctly applied by both the Ninth Circuit and the district court. Petitioners should not be afforded a fourth review of its statute of limitations defense.

II. The Ninth Circuit's Decision Turns On The Facts Of This Case And Does Not Extend Settled Law

Under Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Indeed, the Court's review is discretionary and "depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). The application or, as Petitioners contend, misapplication of ERISA's statute of limitations to the facts of this case is insufficient ground for the Court to review the Ninth Circuit's application of an ERISA statute of limitations.

Here, the Ninth Circuit conducted a de novo review of the district court's finding that CBRE's ERISA claim was not time-barred. It concluded that "[t]he three-year statute of limitations started to run on September 1, 1998, when the Plan hired plaintiff CB Richard Ellis, the fiduciary plaintiff

in this case, as investment manager of the plan. [citations omitted]. This action was timely filed on August 6, 1999." *The Southern California, Arizona, Colorado, and Southern Nevada Glaziers Architectural Metal and Glass Workers Pension Trust, et al. v. Seay, et al.*, No. CV-99-08045, slip op. at 4 (9th Cir. May 16, 2003).

Petitioners urge the Court to grant their petition for certiorari "so that *Landwehr v. DuPree* is not permitted to balloon into a loophole which will nullify the statute." (Petition, p. 20). The Ninth Circuit's application of *Landwehr* to the facts of this case does no such thing. As discussed above, the facts of this case fall squarely within the parameters of *Landwehr*. The Ninth Circuit's decision is a routine application of settled law, not, as Petitioners contend, an "extension" of *Landwehr*. Moreover, the Ninth Circuit's memorandum opinion was not published and therefore, has little, if any, precedential value.

III. The Ninth Circuit's Decision Does Not Conflict With Any Decision Of This Court Or Any Other Court

A well-established ground for granting certiorari is the existence of a true and direct conflict of court decisions on the same matter of law or fact which constitutes an important federal question. Sup. Ct. R. 10(a)-(c); *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 700 (1982); *United States v. Lorenzetti*, 467 U.S. 167, 173 (1984). That is not the case here.

Petitioners have failed to show that the Ninth Circuit's application of ERISA to the facts of this case conflicts with any other decision rendered by this Court or by any other court. Instead, "[c]ases from other circuits likewise measure the limitations period from the date the person bringing suit, and not the plan itself through one of its agents, learned of

the violation." *Landwehr*, 72 F.3d at 732; *Useden v. Acker*, 734 F. Supp. 978, 980 (S.D. Fla. 1989) (refusing to impute the knowledge of a former trustee to a successor trustee for ERISA statute of limitations purposes); *Crimi v. PAS Ind.*, 1995 U.S. Dist. LEXIS 6180 (S.D.N.Y. 1995) (allowing six-year limitations period so long as any plaintiff fiduciary lacked actual knowledge of the breach so as to trigger three-year period); *Mason Tenders District Counsel Pension Fund v. Messera*, 958 F. Supp. 869, 882 (S.D.N.Y. 1997) ("Actual knowledge is measured from the standpoint of the trustees who commenced the lawsuit and cannot be attributed to them by the knowledge of prior trustees or other current trustees."); *District 65 Retirement Trust v. Prudential Securities, Inc.*, 925 F. Supp. 1551, 1559 (N.D. Ga. 1996) (refusing to impute the knowledge of former trustees to successor trustee plaintiffs for purposes of the three-year ERISA statute of limitations); *Bona v. Barasch*, No. 01 Civ. 2289, 2003 WL 1395932, *15 (S.D.N.Y. March 20, 2003) ("[N]umerous courts have concluded that, for ERISA statute of limitations purposes, the relevant question is when a current trustee, and not the plan itself through any of its previous agents, had actual knowledge of a breach of fiduciary duty.").

CONCLUSION

Petitioners have provided no reason, much less compelling reason, to show why the Court should grant their petition for certiorari. Not only was the Ninth Circuit's decision correct under the law and limited to the facts of this case, it does not present a conflict among the courts on an important federal question. Petitioners' request for the Court's certiorari review should, therefore, be denied.

Respectfully submitted,

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